

Staten Island Bus Co., Inc. and John Bini. Case 29–CA-14570

September 24, 1993

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 1, 1992, Administrative Law Judge Howard Edelman issued the attached decision and on March 29, 1993, issued the attached supplemental decision.¹ The Respondent filed exceptions and supporting briefs. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.³

1. The General Counsel excepts to the judge's failure to find that Respondent President Dominick Gatto violated Section 8(a)(1) of the Act by physically assaulting driver John Bini. We find merit in this exception.

The complaint alleges, the judge found, and the credited evidence shows that Gatto spit on Bini and ripped his clothes because Bini had engaged in union activities. The judge, however, neglected to draw legal conclusions based on his findings of fact. We find that by physically assaulting Bini for his union activities, Gatto interfered with, restrained, and coerced Bini in the exercise of his Section 7 rights and that such conduct violates Section 8(a)(1). See *Vanguard Tours*, 300 NLRB 250, 251–252 (1990), modified on other grounds 981 F.2d 62 (2d Cir. 1992); *Yolo Transport*, 286 NLRB 1087, 1093 (1987).

2. The General Counsel also excepts to the judge's failure to make any finding regarding the allegation that the Respondent unlawfully created an impression of surveillance of employees' union activities in viola-

tion of Section 8(a)(1). We find no merit to this exception.

The General Counsel's complaint and posthearing brief to the judge alleges that the violation occurred on January 8, 1990, when Gatto confronted Bini on the bus. In his exceptions, the General Counsel argues that the alleged violation occurred when Gatto conducted employee meetings in May/June 1989.

The General Counsel did not mention the May/June 1989 incidents in the complaint, did not seek to amend the complaint at any time, and did not argue that the incidents violated the Act in his posthearing brief to the judge. In short, the Respondent received no notice that the General Counsel contended that the May/June 1989 incidents constituted an unfair labor practice. Under these circumstances, we find that the surveillance allegation raised in the General Counsel's exception is untimely.

ORDER

The National Labor Relations Board orders that the Respondent, Staten Island Bus Co., Inc., Staten Island, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or physically assaulting its employees because of their union activities on behalf of Local 282, Local 1181, or any other labor organization, or because they engage in protected, concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Bini, Vincent DeLeo, Raymond Garguilo, Kenneth Muir, and Vincent Scudieri immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

(c) Expunge from its records any references to the unlawful discharges of the above-named employees and provide written notice to them that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its place of business in Staten Island, New York, copies of the attached notice marked "Ap-

¹The Board remanded the proceeding to the judge on September 18, 1992, in an unpublished Order.

²The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We note that the record does not support the judge's statement that witness J. Giardino acknowledged having a hearing problem. However, we find that the other reasons given by the judge provide a sufficient basis for discrediting Giardino's testimony.

³We shall modify the judge's recommended Order to provide a remedy for the additional 8(a)(1) violation found. We shall also provide the reinstatement and expungement language that the Board traditionally uses for 8(a)(3) violations.

pendix.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or physically assault employees because of their union activities on behalf of Local 282, Local 1181, or any other labor organization, or because they engage in protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John Bini, Vincent DeLeo, Raymond Garguilo, Kenneth Muir, and Vincent Scudieri immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-named employees whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges, with interest.

WE WILL notify the above-named employees in writing that we have expunged from our records any reference to the unlawful discharges and that the discharges will not be used against them in any way.

STATEN ISLAND BUS CO., INC.

Kevin R. Kitchen, Esq., for the General Counsel.
Steven B. Horowitz, Esq. (Horowitz & Pollack P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on April 1, 3, and 4, 1991, in Brooklyn, New York.

On January 9, 1990, John Bini, an individual, filed a charge in the above-captioned case, alleging that Staten Island Bus Co., Inc. (Respondent) engaged in violations of the National Labor Relations Act. On February 28, a complaint issued alleging that Respondent violated Section 8(a)(1) and (3) of the Act.

Briefs were filed by counsel for the General Counsel and by counsel for Respondent. On a consideration of the briefs, the entire record, and based on my observation of the demeanor of the witnesses in this case, I make the following

FINDINGS OF FACT

Respondent is a New York corporation with its principal office and place of business located in the borough of Staten Island in the City of New York where it is engaged in the operation of providing schoolbus transportation services for the New York City Board of Education pursuant to a contract with the Board. During the years of 1990 and 1991, Respondent performed bus transportation service for various enterprises located in the State of New York, each of which enterprise is directly engaged in interstate commerce as defined in the Act, which services are valued at in excess of \$250,000. During the same period of time, Respondent, in the course of its operation, purchased and received at its Staten Island facility goods and supplies valued at in excess of \$50,000 directly from points located outside the State of New York. It is admitted and I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I find that Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and Local 1181-1061 Amalgamated Transit Union, AFL-CIO (Local 282 and Local 1181) are labor organizations within the meaning of Section 2(5) of the Act.

Respondent employs approximately 70 bus drivers at its Staten Island facility. Bini, a retired policeman, had been employed by Respondent as a driver for 5 years, up until his discharge by Respondent on January 8, 1990. The Staten Island facility is a nonunion facility. Respondent operates similar facilities in other boroughs of New York City. In all, Respondent operates eight facilities of which two, including the instant Staten Island facility, are nonunion. Respondent’s other facilities are union facilities. Approximately 75 percent of Respondent’s work force is unionized. However, Respondent’s contract with the Board of Education covering the Staten Island facility was negotiated based on nonunion wage scales.

Sometime in May 1989, a number of drivers working out of Respondent’s Staten Island facility talked among themselves about bringing in a union. Bini was among the leaders of this movement. Within a week after the initial discussions, Respondent’s president, Dominick Gatto, became aware of

this and met with his employees.¹ During his first meeting with his employees, Gatto told them that he was aware that some of the employees wanted a union, but under no circumstances would he tolerate a union in this shop. Gatto stated that anyone who wanted a union would be fired. Gatto then told employees that he had other shops that were unionized and that if these employees wanted a union they could transfer to one of his union shops. Notwithstanding this meeting, a group of dissatisfied employees headed by Bini continued to talk with other employees about the unionization of the Staten Island facility. Approximately a week later, Gatto met with his employees again. He told them he believed the talk about unionization was over but he has found out that it is still continuing and at this time he accused Bini of being a leader in this movement and of contacting unions in connection with the organization of his employees. Gatto stated this had to stop and, if it continued, the employees who were encouraging unionization would be transferred or out of work.²

Thereafter, union activity tailed off. It picked up again around November. Once again Bini was the leading union advocate. Sometime in November, Bini and a few coworkers contacted Local 282 concerning their interest in representing the drivers. A week or so later, Bini and several other drivers met in the home of one of the employees and discussed the possibility of being represented by Local 1181 rather than Local 282. At this point there was no decision by the employees to actively seek representation by a particular labor organization; the employees were merely discussing their options. The same group of employees, led by Bini, met at an employees home in mid-December and on January 5, 1990. At these meetings the various possibilities were again re-

viewed. No decision to actively seek representation by a particular labor organization was reached.

On January 8 at about 10 a.m. after the drivers had completed their morning run, Gatto asked Nick Angelini, his dispatcher, to call Bini at his home and to report to the Staten Island facility. He did not tell Angelini the reason for the call. Angelini contacted Bini at home and gave him Gatto's message. Pursuant to this call Bini drove the bus to Respondent's facility. As he entered the driveway, Gatto was waiting for him. Gatto testified that sometime during the morning he received an anonymous call from a person who claimed that he had observed Bini's bus speeding on a main avenue in Staten Island. There is no evidence whether children were aboard the bus or how fast Bini was allegedly traveling. Moreover, Bini had been employed by Respondent for a 5-year period and there is absolutely no evidence that Respondent had ever received any complaints about the way Bini drove the bus or about the way he conducted himself on the job. Gatto did not testify as to any dissatisfaction he may have had with Bini's job performance.

According to the credible testimony of Bini when he arrived at Respondent's facility pursuant to Gatto's orders, he saw Gatto waiting for him in the driveway. He stopped his bus alongside Gatto and opened the door. As soon as the door opened Gatto stepped aboard, obviously angry, snatched the keys from the ignition, and screamed at Bini: "You fucking cocksucker." Bini asked Gatto what he was talking about and Gatto screamed: "You no good prick, you're a lying fuck." Bini again asked Gatto what he was talking about and Gatto continuing to scream profanities screamed: "I know all about you, you lying fuck, you betrayed me." Bini pressed Gatto for an explanation and Gatto stated he knew all about Bini's activities and that he knew where Bini was coming from. At this time Gatto was standing on the bottom step of the bus. Bini got up from his seat and was standing on the top step when Gatto asked Bini if he had his gun. Bini was an ex-policeman. However, there is no evidence that Bini ever carried a gun with him or that he even had a gun. Bini denied having a gun. Gatto then spit in Bini's face and again called him a "traitor" and a "cocksucker." Bini spit back at Gatto and Gatto spit at Bini. At this point Gatto, who was very angry throughout this entire confrontation, reached up and grabbed Bini's shirt, which was a company shirt, and with both hands ripped the shirt away so as to tear the shirt and pop the buttons. Gatto then screamed: "This is mine [an obvious reference to the ripped company shirt], you're out of here, you're history, you're fired." Gatto then stepped off the bus. Bini followed and asked Gatto what this was all about. Gatto replied that he knew all about Local 757, that Bini should get his check and leave because he was trespassing. Drivers Ray Garguilo and Vincent DeLeo, who were in the area around the bus, credibly testified that they were unable to hear what went on in the bus but saw Gatto spit at Bini, Bini spit back, and Gatto rip Bini's shirt away from him. They further credibly testified that Gatto stated that he knew about some local, they could not remember the local number referred to by Gatto.

As set forth above, I was very impressed by Bini's credibility. Bini's testimony as to this confrontation was very detailed. Moreover, while testifying, Bini, through the use of hand and facial gestures and vocal inflections, gave me the

¹As set forth and discussed below, Respondent had a reliable group of drivers and other employees who were aware, at all times, of the activities of those employees who supported union organization and who reported these activities, including the names of the employees engaging in such activities to Respondent's president, Dominick Gatto.

²The facts set forth relating to the two employee meetings conducted by Gatto are based on the credible testimony of Bini and Garguilo. Bini impressed me as a very credible witness. I was very impressed with his demeanor. Bini was most responsive as to questions put to him on both direct and cross-examination. His responses were detailed and he displayed an excellent recollection of the facts. His testimony was internally consistent and consistent with other facts not in dispute. Moreover, his testimony was often corroborated by other witnesses that I found to be credible witnesses. In connection with the meetings above, Bini's testimony was corroborated by Ray Garguilo who I find to be a credible witness. I was impressed with his demeanor. He was responsive and his testimony was consistent. On the other hand Gatto was a totally incredible witness. As will be set forth and described below in detail, his testimony concerning the discharge of Bini and subsequent discharge of those employees who engaged in a strike to protest Bini's discharge is unbelievable on its face. Moreover, when he addressed the striking employees his testimony as to what he told them is in a most significant area inconsistent with a self-serving tape recording he made of the second conversation he had with these strikers. Nick Angelini, called by Respondent to corroborate his testimony concerning the above meetings, is not a credible witness since he did not testify as to what was discussed at the meetings, but rather merely denied that Gatto had made the antiunion statements or singled out Bini as set forth above.

distinct impression that he was reliving the incident, rather than merely relating it. Further, an examination of Bini's testimony establishes certain subtleties that would be difficult, even for an ex-policemen to fabricate. The dialogue is extremely detailed. Additionally, although Bini continually pressed Gatto as to the reason for his anger, Gatto responds with vague and subtle references to Bini's union activities by referring to Bini's being "a lying fuck," "You betrayed me" and calling Bini a "traitor," then at a later point stating that he was aware of his "activities," without stating what they were. It was not until Gatto and Bini were out of the bus, and Bini still unaware of the reason for Gatto's actions that Gatto refers to a union local, using a local number that isn't even involved in the case. Further, Bini's testimony that when Gatto ripped Bini's company shirt he stated, "This is mine, this is my shirt," is consistent with an enraged man reclaiming his property from an employee he felt had betrayed him. Moreover, Bini candidly admits to spitting at Gatto in response to Gatto's spitting at him. I conclude that Bini's testimony has the ring of truth. To discredit Bini's testimony would be to credit him with the inventiveness and imagination of a Dickens.

Gatto incredibly testified that on receiving an anonymous call concerning Bini's bus allegedly speeding on a major avenue in Staten Island, he ordered his dispatcher to contact Bini and have him report to Respondent's facility. Rather than waiting in a warm office for Bini to report, Gatto elected to wait in the driveway on a cold morning in January for Bini. According to Gatto, when Bini arrived Gatto entered the bus and told him he had received a report about his speeding on Amboy Road. Bini became irate and asked Gatto why he was picking on him. Gatto replied: "Watch how you're talking to me." According to Gatto, Bini then responded: "I'm tired of your shit" and proceeded to spit in Gatto's face. Gatto then stepped up to the aisle and took the keys out of the ignition. At this point, Bini got up and stood face to face with Gatto. Gatto then backed down the steps and Bini proceeded to kick and push Gatto. Gatto testified that in an attempt to keep his balance he grabbed Bini's shirt and in so grabbing the shirt it must have ripped. It was at this time that Gatto first advised Bini that he was fired. Gatto then testified that Bini began rummaging through the glove compartment of the bus in what Bini believed was an attempt to get his gun. Gatto did not testify why he believed that Bini carried a gun, or why such gun, if it existed, would be carried by Bini in the glove compartment of Gatto's bus.

As set forth above, I did not find Gatto to be a credible witness. I was not impressed with his demeanor. His testimony was often vague. He impressed me during the course of his testimony as a fiery and very emotional witness. Moreover, much of his testimony concerning the facts surrounding the discharge of Bini strikes me as patently unbelievable. Gatto's testimony that he waited outside in the driveway to confront Bini about an anonymous and vague complaint concerning Bini's alleged speeding does not seem believable. Bini had been employed by Respondent for 5 years without any complaints about his job performance. If this issue were the only issue involved it would make more sense for Gatto to wait for him in his office rather than a cold driveway. However, such conduct would be consistent with Gatto's anger at being informed by employees of Bini's union activities as late as January 5, at a time when Gatto

probably assumed there was no union activity.³ It would be logical that Gatto was angry and regarded Bini's union activities as a betrayal, and was anxious to confront him. Additionally and significantly, Gatto's testimony that following his questioning Bini as to the anonymous complaint about his speeding, Bini responded by cursing at Gatto and spitting in his face, strikes me as completely improbable. If Bini had responded as contended by Gatto, the logical response by any employer to such conduct would be immediate discharge. However, the testimony of Gatto is that he did not discharge Bini at this time. Further, as set forth in detail below, I conclude that Gatto, in connection with his conversations with the striking employees on January 9, attempted to manufacture favorable testimony. On this basis alone, I would conclude that Gatto is a totally incredible witness, entirely unworthy of belief.

Respondent called two witnesses to corroborate Gatto's testimony. Jim Beatty, an officer of Respondent, testified he heard what he believed to be a commotion outside in the yard. He was standing in one of Respondent's buildings, on the second floor looking out of a closed window. He was unable to see or hear anything that related to the circumstances of Bini's discharge and therefore he is unable to corroborate Gatto's testimony. His testimony appeared to be limited to his observation that he did not see DeLeo or Garguilo in the area. However, his view was obviously limited, and there is no evidence at what point in time he looked out the window in relation to what was taking place. Accordingly, I find his testimony substantially valueless. Counsel for Respondent also called Nick Angelini, a dispatcher who was present in the area at the time of the confrontation between Gatto and Bini. Angelini testified negatively pursuant to leading questions put to him by counsel whether he heard Gatto accuse Bini of trying to unionize his shop and negatively whether Gatto mentioned anything about a union. In view of my favorable credibility resolutions concerning Bini, Garguilo, and DeLeo, and the one word negative responses by Angelini to the leading questions described above, I conclude such testimony fails to corroborate Gatto's testimony in this regard. With respect to the facts surrounding Bini's discharge, Angelini arrived in the area following the initial exchanges between Gatto and Bini and did not observe Bini spit at Gatto. He was unable to hear any of the verbal exchanges between Gatto and Bini but testified that from a partially blocked view he saw Bini's foot come out and Gatto fall backward. However, at another point in his testimony he testified that he saw Gatto appear to slip and fall backward and he failed to testify about any kicking action by Bini until pressed further by Respondent counsel. I conclude such inconsistent testimony from an admittedly partially blocked viewpoint to be of little corroborative value.

On January 8, following Bini's discharge, word got around among the employees that Bini had been discharged. A number of employees contacted Bini and Bini contacted other employees. They discussed Bini's discharge and decided to

³ Gatto admitted that following Bini's discharge, he learned from various drivers that Bini was attempting to organize a work stoppage on January 9, and thereafter learned from other drivers that a work stoppage was scheduled for the morning of January 9. As set forth below in my analysis, I conclude that Gatto employed a group of loyal employees who kept him informed of employees who engaged in union activities and the extent of such activities.

picket Respondent's facility the following morning to protest Bini's discharge. During the course of January 8, Gatto was admittedly informed of the employees' plans to picket the Staten Island facility on the morning of January 9 by a number of his employees.

On January 9, about 6:30 a.m. about 15 drivers were gathered outside Respondent's facility picketing. They carried picket signs which stated, among other things, this Respondent was unfair to their workers, and "Staten Island Bus Unfair Labor Practice." When Gatto arrived shortly after, he called the police to disperse the pickets. The police arrived and told the strikers to picket across the street. Some of the pickets had stopped picketing and gone to work. Bini, DeLeo, Kenneth Muir, Vincent Scudieri, and Raymond Garguilo went across the street to continue their picketing. Shortly thereafter Gatto came out and went across the street to where the strikers were standing. Gatto then told them that he knew they were the ringleaders and that they were fired.⁴

A short time later Gatto returned to the above-named strikers. He carried a tape recorder on his person. Presumably this was pursuant to the advice of his attorney. He told the employees that they were not fired but that if they did not return to work they would be quitting their job. DeLeo and another employee exclaimed that they had been told they were fired. Gatto replied that he didn't tell anyone they were fired, but that unless they returned to work they would be quitting their job.⁵ The employees did not return to work. There is no evidence whether replacements were hired.

Respondent, in an attempt to discredit the testimony of Bini, called Joseph DeMarco, a driver, as a witness. DeMarco testified that on or about January 10, Bini called him on the telephone. DeMarco was unable to recall much of the conversation. The only thing he could recall was that Bini said to him concerning his discharge on January 8, "You can say you were at the yard" and DeMarco replied that he drove a van and was never in the yard, and Bini replied, "That's right, I'll get somebody else." Bini admits talking to DeMarco on January 8 as well as about 40 other employees. The purpose of these discussions was to inform the employees of his discharge and encourage their participation in picketing to protest his discharge. He specifically denied that he had contacted any employee to determine whether they had witnessed his discharge, or to ask them to testify that they had witnessed his discharge. I have found Bini to be a very credible witness. However, even if I were to credit DeMarco's testimony, it is vague, he was unable to remember how the conversation started and flowed. He could only

remember the two sentences described above. I find such testimony insufficient to affect the credibility of Bini.

Analysis and Conclusions

In determining whether Respondent discriminatorily discharged Bini, General Counsel has the burden of proving that Bini's union activities were a motivating factor in the discharge. Once such factor is established, the burden shifts to Respondent to establish the same action would have taken place in the absence of such union activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Wright Line*, 251 NLRB 1080 (1980), enf'd. 662 F.2d 899 (1st Cir.), cert. denied 455 U.S. 989 (1982).

The credible evidence establishes a logical and conclusive case that Bini was discharged solely because of his union activities. In May 1989, Respondent acquired knowledge of his employees' union activities at the Staten Island facility, and particularly those activities of the chief activist, Bini, undoubtedly from his employees in the same manner as he learned about the employees intention to strike on January 9, 1990. In response to such activities, he offered to transfer employees who wanted union representation to his union facilities and to discharge employees, particularly Bini, if they persisted in attempting to organize the Staten Island facility. The reason he did not want the Staten Island facility organized is obvious. He had a contract with the Board of Education for this facility which was based on a nonunion rate. If he became organized and entered into a contract with a union he would undoubtedly be required to pay a substantial increase in wages and other fringe benefits, thus severely reducing his profit. Following the May 1989 meetings, Gatto believed interest in organizing the Staten Island facility had ended. When he was undoubtedly informed of his employees meeting on January 5, 1990, to continue discussions about the organization of the Staten Island facility and of Bini's part in such activities, he undoubtedly became furious at Bini and regarded him as a traitor. Again, Gatto probably learned of Bini's activities through some of his employees. On learning of this, he ordered Bini to report to the shop immediately. What followed is supported by Bini's perfectly logical and credible testimony. He was so angry, that rather than wait for Bini in the office, he waited for him outside, in the yard, in the cold. As soon as Bini arrived, stopped the bus, and opened the door, Gatto came aboard and furiously called him a traitor, spit at him, angrily ripped off his company shirt, and fired him on the spot. Such conduct is consistent with a man who felt betrayed and had so much at stake economically if Bini's organizational activities were successful. Respondent's defense that Gatto wanted to see Bini because of an anonymous complaint made over the telephone to Gatto, and unsupported by other evidence, was not credited. Under these circumstances and based on the credible evidence, I conclude that the only reason for Bini's discharge was his union activities. Moreover, I conclude that Bini's spitting in Gatto's face was an act that was provoked entirely by Gatto's physical and irrational behavior. Accordingly, I conclude that Bini's discharge was in violation of Section 8(a)(1) and (3) of the Act.

With respect to General Counsel's allegation that Gatto discharged the striking employees, it is clear and undisputed that the employees were striking to protest Bini's discharge primarily and working conditions secondarily. The timing of

⁴ Gatto denied the above conversation. For the reasons set forth above and below, I do not credit Gatto's testimony in this connection. Moreover, all of the above-named employees credibly corroborated Bini's credible testimony.

⁵ Respondent submitted into evidence both the original tape and a transcript of this tape. When the tape was played during the course of the trial you could here the voice of DeLeo and another employee spontaneously and incredulously screaming, "You told me I was fired" and "I was standing up here and you told me I was fired." These statements are also contained in the transcript. It is obvious, and I conclude that Gatto was trying to manufacture testimony in order to support his denial at trial that he had discharged the strikers. Such action by Gatto concerning such a significant issue of this case totally destroys his credibility in my opinion.

the strike, Bini's organization of the strike, and the language of the picket sign conclusively establish this. Accordingly, I conclude that the employees were unfair labor practice strikers. Such activities are protected concerted activities. *Abilities & Goodwill*, 241 NLRB 27, 37-38 (1979). The credible evidence establishes that on encountering the strikers, Gatto fired them because they along with Bini were ringleaders in connection with the attempt to unionize Respondent's Staten Island facility. However, even if I were to credit Gatto's attempt to manufacture taped evidence, the Board has held that an employer's statement to striking employees, that unless they return to work it will consider that they have quit, similarly constitutes a discharge. *Workroom for Designers*, 274 NLRB 840, 855 (1985).

Respondent contends the strike was not protected because Gatto had an open-door policy and was always willing to discuss an employees discharge or other terms and conditions of employment. Respondent cites in support of this argument *Arlan's Department Store*, 133 NLRB 802 (1961). Respondent's contention is not only without merit, it is ridiculous. In *Arlan's*, the striking employees were represented by a union which had a collective-bargaining agreement with the employer which contained a grievance and arbitration clause and a no-strike provision. The only issue relevant was whether in view of these provisions, the discharge of a union steward justified such strike. Respondent's alleged open-door policy is hardly the equivalent of a collective-bargaining agreement with a union containing arbitration and no-strike clauses. In the instant case, the employees were unrepresented.

Accordingly, I conclude that Respondent, by discharging the strikers set forth above, violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 282 and Local 1181 are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging its employees John Bini, Vincent DeLeo, Raymond Garguilo, Kenneth Muir, and Vincent Scudieri, Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Since I have found that Respondent discriminatorily discharged its employees Bini, DeLeo, Garguilo, Muir, and Scudieri, I shall recommend Respondent make whole said employees together with interest as set forth below, from the date of their termination until their reinstatement or valid offer of reinstatement.

Backpay for the above employees shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Interest on and after January 9, 1990, shall be computed at the "short-term" Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621 in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be com-

puted as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).

I shall also recommend that Respondent expunge from its records any reference to the discharges of the above-named employees, and to provide written notice of such expunction to those employees, and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel action concerning them. *Sterling Sugars*, 261 NLRB 472 (1982).

[Recommended Order omitted from publication.]

Kevin R. Kitchen, Esq., for the General Counsel.
Sanford N. Pollack, Esq. and Steven B. Horowitz, Esq.
(Horowitz & Pollack P.C.), for the Respondent.

SUPPLEMENTAL DECISION

On September 18, 1992, the Board issued an Order remanding the above proceeding to the administrative law judge for the sole purpose of allowing Respondent to introduce further testimony and any rebuttal testimony concerning Respondent's May and June meetings with its employees, the events surrounding Bini's discharge on January 8, 1990, and the picketing activities of certain of Respondent's employees which resulted in their discharge on January 9, 1990. Pursuant to the Board's remand Order, the trial of this case was reopened on December 3, 1992. Counsel for General Counsel and counsel for Respondent were present. During the course of this reopening, Respondent was permitted to elicit unlimited testimony, not elicited during the course of the original trial on all issues covered by the remand.

Alphonse DiBonis, a witness called by Respondent, was Respondent's general manager, and an admitted supervisor within the meaning of the Act, at the time of the May and June meetings. By January 8, he was employed as a driver for Respondent as a result of illness which prevented him from functioning in his prior supervisory capacity. At the time of this trial, DiBonis was employed by Respondent as a driver. DiBonis testified that Gatto was aware that the drivers were talking about bringing a union into Respondent's Staten Island facility and called a meeting in May for the sole purpose of discussing this union activity. DiBonis testified that during the course of this meeting, Gatto stated that he could not afford a union in this facility at this time and that anyone unhappy with this situation could transfer to one of his other union facilities. DiBonis testified that Gatto then made John Bini read his contract with the Board of Education of Staten Island aloud, to prove that he could not afford to have a union in this facility. However, DiBonis was vague and really not able to recall why Bini was selected to read this contract.

As set forth in my initial decision, I concluded that Respondent was at all times aware of the union activities of its employees, and who were the active employees. DiBonis' testimony only reinforces this conclusion.

DiBonis further testified that a second meeting was called by Gatto in June because he had heard that notwithstanding his May meeting, the union activities of his employees were continuing. The evidence in the initial decision established that Bini was the chief union activist.

DiBonis then testified that during the second meeting that Gatto essentially repeated the statements he made during the

May meeting. DiBonis denied that at any time during the first two meetings that Gatto told any employee that if anyone joined the Union something would happen, or that they would be fired, or that he accused Bini of being the ringleader of such union activity.

Respondent next called E. Litito who was employed by Respondent as a driver during the May-June meetings and is currently employed by Respondent in the same position. Litito was very vague in describing what took place at both meetings. He testified that during the first meeting he sat in the back and really could not hear what was being said very well. Moreover, he admitted that he has a hearing defect. However, he did testify that Gatto stated that he could not have a union here and if anyone wanted to belong to a union he would send them to his Brooklyn shop which had a union. Pursuant to leading questions, DeBonis recalled that Gatto asked Bini to read a document Gatto handed him, but he could not hear what Bini said because of the fact that he was sitting in the back and because of his hearing defect.

Litito was also present at the June meeting and testified that Gatto said that he thought the union activity was all over and that everybody was happy, but if they still wanted a union they could be transferred to his Brooklyn shop. Litito denied that Gatto told Bini or anyone else during the May meeting that they would be fired or transferred for engaging in union activity. He could not remember if Gatto made such threats during the June meeting.

B. Russo, a busdriver presently employed by Respondent, testified that he was present at both meetings. However, his testimony as to what he could recall was especially vague. Pursuant to a series of questions put to the witness by Respondent's attorney and me, Russo testified that Gatto said, "He heard talk about some men were unhappy. . . . He heard men were unhappy there, and he wanted to know why they were unhappy. . . . And let me see now, unhappy because of some talk of a Union, I think or something." When questioned further by Respondent, pursuant to leading questions, Russo testified that he believed Bini asked a few questions, but could not recall what was he asked. When further questioned, by leading questions, he testified that Gatto handed Bini a piece of paper and when still further questioned by leading questions he testified that Bini was "reading prices or things like that, to that effect." Pursuant to another leading question, he testified that Gatto stated that if the men were unhappy he would transfer them to another garage. Yet despite an obvious inability to recall what did take place during the meeting, most of his testimony being elicited through leading questions when asked whether Gatto told any employee they would be fired if they brought in a union, or whether he accused anyone of being the ringleader for the Union, his reply was "absolutely not."

Russo testified as to the June meeting that Gatto stated that he heard the drivers were unhappy and if anyone wanted to move to another garage he would transfer them. He made the same absolute denials as to threats or singling out Bini as the ringleader as he did in the first meeting.

Peter Martino, a busdriver employed by Respondent, testified that Gatto held two meetings, one in May and one in June. His testimony as to what took place at these meetings was vague and obtained pursuant to leading questions. Martino testified that Gatto said that there was talk of a union here and he could not have a union because he wasn't

making money. He had Bini read some papers, but could not really recall what he read, but it was something about rates and prices. Martino testified that Gatto told the employees that if they wanted to go to his Brooklyn company, he would transfer them. He testified that Gatto did not threaten anyone that if they wanted a union they would be fired. However, he could not recall if Gatto accused anyone of being a ringleader.

As to the June meeting, Martino testified that Gatto told the employees that he could not have a union, and "if you want a union you can go over to Brooklyn." When asked by counsel for Respondent whether he singled out Bini at all at this meeting, Martino's response was "Not that I know of no."

J. Giardino, employed by Respondent, testified that he attended an employee meeting in May in which Gatto spoke to the employees. His testimony as to what took place during the course of this meeting was vague and was elicited in significant part by the use of leading questions put to him by Respondent counsel. For example when asked by counsel for Respondent what Gatto or anyone else stated at the meeting that he could recall, Giardino testified, "Well he was talking that he heard we were unhappy and that he heard there was something about a union being started there and he proceeded to tell us why there couldn't be a union there." The witness was then asked by Respondent's counsel "there come a time when he handed out some papers to anybody?" and Giardino replied, "Handed out papers? no." Respondent counsel, leading the witness further, asked, "Did he ask Mr. Bini to read, compare any prices." Giardino replied, "Yeah, at that time while he was talking about certain things, about the contract, or something like that he handed something to John Bini to read out prices or something like that." Then, still leading the witness further, counsel for Respondent asked the witness, "Did Mr. Gatto say anything about what employees who wanted a union should do?" and Giardino then testified that those employees could transfer to a garage he had in Brooklyn. When he was asked by counsel for Respondent whether Bini was singled out when Gatto gave him the above-described paper, Giardino testified, "Not to my knowledge." Giardino testified similarly when questioned about whether Gatto accused any employee of being the ringleader. And again, when questioned about whether Gatto specifically warned Bini that if he wanted a union he would get fired, Giardino's testimony was "Not to my knowledge."

With respect to the June meeting, when questioned about what took place, Giardino testified, "The best that I can recall that Dominic gave the meeting and he said that he heard that there was still talk about a union and he thought at the last meeting that it was over." When asked by Respondent if he threatened any employee at that meeting Giardino again testified, "Not to my knowledge," and when asked whether Gatto singled any employee out Giardino testified, "No, not that I know of."

It should also be noted that during his testimony Giardino had trouble hearing counsel for Respondent, who was standing about 10 feet away from the witness, although Pollack speaks in a particularly resonant tone with excellent articulation. Giardino acknowledged that he had a hearing problem.

In my initial decision in this case I concluded that Bini in particular was an extremely credible witness and that Garguilo was a credible witness for the reasons set forth in

detail. I also concluded that Gatto was a particularly incredible witness who attempted to fabricate testimony through a tape recording, as also set forth in detail in my initial decision. Respondent's witnesses who testified in the remand have not caused me to overturn, reverse, or modify my initial credibility resolutions. With respect to the witnesses who testified on behalf of Respondent concerning the May and June meetings, I simply do not believe they were able to recall with any dependability whether Gatto made the accusation that Bini was the "ring leader" and threats of discharge for continued union activity found in the initial case. I was negatively impressed with the demeanor of all five witnesses who testified on behalf of Respondent. There has been a lapse in time of 1-1/2 years from the date of the events to which they gave testimony and the date of their testimony. There is no evidence that they gave any pretrial statements. It is not reasonable to expect that they would remember with any degree of reliability the details of such meetings. Moreover, all the five employees are still employed by Respondent, and their testimony cannot help but be influenced by the unfair labor practices committed by Respondent as set forth in the initial decision. Additionally, DiBonis, was Respondent's general manager at the time of these meetings. Further, the testimony of these employees was often vague, frequently elicited through leading questions, the denials as to the specific threats or that Bini was the ringleader were either unbelievable or equivocal. For example, Russo's testimony was not only vague, but much of it was elicited pursuant to leading questions. Yet, notwithstanding such an obvious lack of recollection as to what Gatto stated during the May and June meetings, he was absolutely certain that such threats and statements about Bini being the ringleader for the Union were not made. Under these circumstances, I find such denials unreliable and incredible. Martino similarly testified as to what was said at the meetings pursuant to leading questions. Yet, he specifically denied that Gatto threatened any employee with discharge if they wanted a union, but was unable to recall whether Gatto accused anyone of being a "ring leader." Similarly, when asked by counsel for Respondent whether Bini was singled out for anything during the June meeting he was unable to recall. Giardino's testimony was also vague and much of it obtained pursuant to leading questions. He testified that he had no knowledge of the unlawful threats or statements about Bini being a ringleader for the Union. Additionally, both Litito and Giardino were both hard of hearing which renders their testimony additionally suspect.

There can be no doubt that Respondent had knowledge of the employee union activities as they took place, and who the active employees were. Such information was obviously obtained from employees loyal to Gatto who were contacted by Bini and his followers. In this connection Respondent's witness, DiBonis, a supervisor at the time of the meetings, admitted in his direct testimony during the remand that Respondent had such knowledge of the employees union activities. Knowledge is further evidenced by his calling employee meetings every time the employees had a union meeting and stating to the employees that he was aware of such union activities, and that he could not have a union *in this facility* and offering the employees who wanted one the opportunity to transfer to his Brooklyn facility which was unionized. That he was aware of the employees continued activities is evidenced by his calling the June meeting where he told the

employees that he thought the matter was settled and then repeating much of what he said during the first meeting. That he was aware of Bini's activities in particular is easily inferred that if he was being informed of the unions activities he was also being informed as to the active employees. It is further evidenced by his requiring Bini to read aloud his contract with the local board of education in an obvious attempt to convince Bini and the other union supporters that he could not afford a union in this facility, given the terms of his contract. His knowledge of Bini's "ring leader" status is conclusively established by his reference to Bini during the meetings as the "ring leader."

Respondent's counsel contends that Respondent had no union animus because it had other union shops and was willing to transfer employees who wanted a union to one of those shops. This is beside the point. The testimony of Respondent's own witnesses clearly establish that Gatto took the position that he could not and would not have a union at this facility. The employees have an absolute right under the Act to organize the facility where they are employed. As to this facility, Respondent's version of the facts, and certainly the credible facts, conclusively establish intense union animus.

Respondent called two additional witness in connection with the discharge of Bini on January 8. Both witnesses gave testimony which reaffirm my credibility resolutions and my conclusion that Bini was discriminatorily discharged.

Respondent's first witness was Dan DeLuca, presently employed by Respondent as a busdriver. DeLuca testified that on January 8, sometime near the end of the confrontation between Bini and Gatto he drove up Respondent's driveway, behind Bini's bus and parked. He was able to hear loud voices coming from Bini's bus, but could not hear what was being said. He observed Nick Angelini stand by the bus door. He got out of his bus and went along side of Bini's bus door which was open. He still was unable to hear what Bini or Gatto were saying. He then testified that he saw Bini shove Gatto and Gatto stumble off the steps of the bus, and that Gatto grabbed a rail for support. Notwithstanding a series of leading questions by Respondent's counsel, DeLuca insisted that he only saw Gatto grab the rail for support. Since there is no dispute that Bini's shirt was ripped, DeLuca's testimony contradicts that of Angelini, and tends to support my initial credibility resolution. DeLuca was unable to testify as to what took place, or what was said by the parties when Bini and Gatto got out of Bini's bus.

Respondent's second witness was Janet Tocci employed by Respondent as an office manager. Tocci testified that sometime in the midmorning period she got a telephone call from an anonymous male who simply told her that he had observed one of Respondent's buses speeding on Amboy Road, a major roadway in Staten Island, and wanted to speak to an owner, he did not state where on Amboy Road such incident took place or in any other way identify the bus or the driver. She transferred the call to Gatto, but did not hear the conversation between Gatto and the caller. There is no evidence from her testimony or the record in the initial trial as to exactly why Gatto came to the conclusion that the complaint referred to Bini's bus.

Tocci then testified that about 15 minutes later she heard some yelling and recognized Gatto's voice. She did not hear what was being said. She went to the doorway of Respond-

ent's office and stood some 10 feet away from the bus and saw the driver, who she did not identify, spit at Gatto, and push him. Tocci next testified, "So he started to fall backward and he grabbed Dominick to, I guess to grab onto something or you know to stop himself from falling." Then pursuant to a leading question by Respondent's attorney, she then testified that "No Dominick grabbed up to to try to grasp something so he didn't fall backward and he grabbed his shirt and ripped the shirt." Tocci testified that Angelini was standing behind Gatto by the door outside the bus and that he supported Gatto as he stumbled. At this point she went inside. She was therefore unable to give testimony what was said when Gatto and Bini were standing outside the bus. Tocci then testified that she went upstairs to the second floor and looked outside the window and saw Bini, Gatto, DeLuca, and Angelini standing outside. She testified there was no one else outside.

I did not find Tocci to be a credible witness. She is a longtime employee, and holds the supervisory position of office manager. Her demeanor during her testimony concerning the anonymous telephone was calm and confident. Her demeanor changed starkly when she started to describe what she observed outside the bus. She appeared to me to be visibly nervous, as her testimony tends to establish. She required a leading question by Respondent's counsel before she was able to testify that Gatto grabbed Bini's shirt. Moreover, on cross-examination, she was unable to recall whether Angelini was standing behind or in back of Gatto, although she testified on direct that he Angelini was standing behind Gatto facing the doorway. Angelini testified that he was standing by the side of the doorway. I also find it difficult to believe that she was certain that DeLeo and Garguilo were not present in the yard when she was so uncertain as to whether Angelini was standing to the front or side of the bus door entrance. Based on her demeanor and her testimony as described above, I conclude that Tocci is not a credible witness.

Respondent tried to establish that DeLeo was not present in the yard on January 8 with the testimony of Maureen Gonzolas, Respondent's payroll manager, who testified that the payroll records established that DeLeo was not paid for any day of the week of January 8, 1990. However she testified that Respondent's payroll records are generated from employee timesheets. Counsel for General Counsel requested the timesheet for DeLeo for that pay period. Gonzolas testified that this timesheet had disappeared, that "somebody tore it off." DeLeo testified in rebuttal that he worked on January 8, both morning and afternoon, filled out his timesheet and deposited his timesheet with the dispatcher, and got paid for the day. As to this testimony, I conclude that there is insufficient evidence to establish that DeLeo was not present in Respondent's yard at the time of Bini's discharge.

With respect to the discharge of Bini, none of the witnesses submitted by either Respondent or General Counsel were able to give testimony as to what was said and what took place inside the bus which led to Bini's discharge. As set forth in my initial decision in great detail, I concluded that Bini was a very credible witness and that in contrast

Gatto was an incredible witness, who tried to manufacture testimony and was entirely unworthy of belief. The witnesses' testimony elicited by Respondent have not persuaded me to reverse or in any way modify my credibility resolutions concerning Gatto or Respondent's other witnesses who testified during the course of the initial trial.

With respect to the picketing that took place at Respondent's facility, there is no dispute that such picketing was to protest the discharge of Bini. Since I have concluded that Bini was discharged in violation of Section 8(a)(3) of the Act, it is clear that such picketing and refusal to return to work amounted to an unfair labor practice strike for the reasons set forth in my initial decision. Respondent introduced the testimony of DiBonis, Russo, Litito, Giardino, and Martino. These employees testified that they were contacted by Bini or one of his supporters and asked to participate in picketing and a strike to protest the discharge of Bini. From the testimony of those employees it would appear they arrived at Respondent's facility after the employees had separated into two groups. The credible and uncontradicted evidence in my initial decision established that Gatto initially approached the group consisting of Bini, Garguilo, DeLeo, Scudieri, and Muir which was on one side of the street, and told them that he knew they were the ringleaders and were fired. Gatto then went into his office. A short time later, Gatto returned with a tape recorder and essentially told the employees that they were not fired, but that unless they returned to their job they would be quitting their job. Respondent's witnesses essentially corroborated Gatto's tape recorded statements, which I credited in my initial decision. In this connection, they all testified that Gatto came out with a tape recorder and told both groups of employees that they were not fired but if they did not return to their jobs they would be considered to have quit. When questioned by me, these witnesses admitted that in preparation for their testimony they reviewed the tape transcript. I have no problem with this procedure, since I credited the tape and transcript which also includes the spontaneous exclamations of the Bini, DeLeo, Garguilo, Scudieri, and Muir that Gatto had told them they were fired when he met with them initially. Moreover, one of Respondent's witnesses, Martino, admits that he heard Gatto tell these employees that they were terminated, notwithstanding counsel for Respondent's repeated attempts through leading questions to get him to recall that the word "resign" was used rather than the word "terminated."

However, for the reasons set forth in my initial decision, I conclude that whether there was one meeting or two meetings, and whether Gatto told the employees they were fired or that if they did not return they would be quitting, these employees were discharged in violation of Section 8(a)(1) and (3).

Accordingly, after a review of the initial decision, and the testimony and exhibits of Respondent's witnesses pursuant to the Board's remand, my observation of the demeanor of the witnesses, my careful review of the record, and briefs submitted by counsel for General Counsel and counsel for Respondent, I reaffirm without any modification, my findings of fact, conclusions of law, and my recommended Order.